

COMMERCE, PRODUCTION AND THE FISCAL POWERS OF CONGRESS: II*

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THE CHALLENGE OF THE "NEW DEAL"

Following the decision of *Frothingham v. Mellon*¹⁴⁶ one commentator noted¹⁴⁷ that the ruling in that case has "made it difficult, if not impossible, for the courts to exercise any check" upon Congressional appropriations. It is probable that "if not" was intended to convey the meaning of "even though not" rather than the much stronger "or even"; but others, even very recently, have not been this careful in qualifying their statement that "the spending power of Congress is beyond the range of judicial attack."¹⁴⁸ The scope of this power, it seemed, had become a "political" question. But such a conclusion was based upon the assumption that the government would be careful to confine its operations within the bulwark of the *Frothingham* rule, drawing upon the general fund for all doubtful appropriations¹⁴⁹ and so conducting itself as to prevent other grounds for action arising. Instead, the present administration, with a candor which is to be commended, chose to abandon this immunity from suit in return for the greater degree of flexibility in its program thereby secured.

The crop reduction program of the A. A. A. could well have been financed exclusively from the general fund. Many originally felt, entirely apart from the question of judicial checks, that it would be wise to do this. Such a choice would have prevented the pyramiding of taxes and by the same token lessened the danger of price rises so great as seriously to reduce the demand for the products. But the government chose to raise the greater part of the money necessary for rental and benefit payments through special excise taxes, to be collected solely upon the processing of those products concerning which such payments were to be made, and definitely earmarked for such use.¹⁵⁰ By doing so it created a set of facts entirely apart from those of *Frothingham v. Mellon*. The processors' interest in these expenditures could not be characterized as "indefinite," nor was it shared "in common with people generally." Their bearing upon this tax bill, far from being "remote,

*For the first installment of this article, see (1936) 45 YALE L. J. 751.

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146. 262 U. S. 447 (1923).

147. Note (1924) 37 HARV. L. REV. 750, 753.

148. Seaks, *Power of the Federal Government to Condemn for Housing* (1934) 1 LAW AND CONTEMP. PROB. 232, 233.

149. This view assumes that the mere size of an appropriation would not render the *Frothingham* rule inapplicable. But see *infra*.

150. 48 STAT. 35 (1933), 7 U. S. C. A. §§ 609 (a), 612 (b) (1935).

fluctuating and uncertain," was direct and determinate. Although the issue was never litigated, and has now become moot in the case of the A. A. A., it is entirely probable that one who is so situated will be held to be a proper party to contest the validity of an appropriation in an action to enjoin the spending of the money or the contracting of debt.¹⁵¹

Entirely apart from such a possibility, judicial review of the A. A. A. program was inevitable.

"It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. . . . If the different parts 'are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.'"¹⁵²

One who is adversely affected by a provision which, if passed independently, would be valid, may rely upon the invalidity of these connected portions of the act.¹⁵³ Obviously nothing could be clearer than that the processing taxes were not independent of, but directly dependent upon, the provisions for rental and benefit payments. Hence the validity of these payments was certain to be attacked the moment that the government's right to collect or retain such taxes was called into question, whatever the form of the action might be.

Wherever the proceeds of a tax are earmarked for an unconstitutional use and the tax is levied solely in contemplation of such use,¹⁵⁴ an additional argument against the validity of the tax can be made on the doctrine that there can be no lawful tax which is not levied for a lawful

151. Although no such injunction was sought in the *Hoosac Mills* case, the majority opinion, in reply to certain contentions on behalf of the government, stated that *Frothingham v. Mellon* "might be an authority" against the granting of such relief. 56 Sup Ct. 315 (1936). The form of the statement necessarily implies that on the other hand it may not be in point. Cf. *Williams v. Riley*, 280 U. S. 78 (1929). If Congress continues making it difficult for a taxpayer to enjoin the collection of an allegedly illegal tax, and restricting his right to recover such taxes when paid under protest, we may expect an early effort to establish this remedy.

152. *Pollock v. Farmers Loan and Trust Co.*, 158 U. S. 601, 636 (1895), quoting *Shaw, C. J.*, in *Warren v. Charlestown*, 2 Gray 84 (Mass. 1854).

153. *Ibid.*

154. Cf. § 32 of the 1935 amendments to the AGRICULTURAL ADJUSTMENT ACT, 49 STAT. 774, 7 U. S. C. A. § 612 (c), (1935), appropriating "an amount equal to 30% of the gross receipts from duties collected under the customs laws" for certain purposes under the act. There was no corresponding increase in the tariff rates. Obviously the invalidity of those purposes, or even of the entire act, would only invalidate this appropriation, and would not affect the tariff. See the discussion of the new taxes levied in connection with the RAILROAD RETIREMENT ACT of 1935 at p. 49, *infra*.

purpose. In essence this is merely the same argument in new dress, the facts to be proved under either being identical. But it is further evidence that the Court's ruling in *United States v. Butler*¹⁵⁵ that the processing taxes are not true taxes was purely gratuitous, and that the reverse conclusion would have had no effect upon the necessity of passing upon the validity of the spending clauses of the Agricultural Adjustment Act.

Although definite earmarking furnishes this additional form of the argument, it is by no means necessary. The Social Security Act¹⁵⁶ levies income taxes upon the wages of employees and excise taxes upon employers measured by the size of their payrolls, all proceeds to be paid into the general fund for undesignated uses. The nationally financed and administered scheme of retirement pensions,¹⁵⁷ like all other portions of the act, are financed exclusively from the general fund. Yet these taxes were obviously adopted in contemplation of this pension system, being intended to reimburse the general fund for the drain which will be made upon it by these pensions. The government's own literature concedes as much when it links the two in summaries of the security plan; and of course the fact that the definitions of "wages" and "employment" are identical in the sections providing for pensions and in those levying the taxes is further evidence. It would seem idle to argue that the latter would have been adopted without the former, or that the Court should sustain either tax if it finds the pension plan unconstitutional. As the law requires the employer to deduct the amount of the employee's tax from his wages, an additional means of contesting the validity of this tax, and hence of the pension system, is to be had through an action by an employee against his employer for wages due. This is one appropriation the validity of which can be contested the moment an interested group decides that it is wise to do so.¹⁵⁸

At first blush the second group of excise taxes upon employers,¹⁵⁹ likewise measured by payrolls, might seem to open the way to an attack upon the plan for federally aided state unemployment insurance systems. As a credit up to 90% of the federal tax is allowed to employers contributing to a state unemployment insurance fund, the connection between the taxing and substantive provisions is, if anything, even more clear than in the case of the pension system. But there is less reason to conclude that the tax would not have been levied without

155. 56 Sup. Ct. 312 (1936), discussed in first installment of this article in (1936) 45 YALE L. J. 751.

156. 49 STAT. 636, 42 U. S. C. A. §§ 1001-1011 (1935).

157. *Id.* at §§ 401-410.

158. A test case is now pending in a supreme court of the District of Columbia. 3 U. S. LAW WEEK 614 (1936).

159. 49 STAT. 636, 42 U. S. C. A. §§ 1101-1110 (1935).

the accompanying federal subsidy. It is complete in itself, being obviously intended to counter-balance the advantage which might otherwise accrue to the employer in a state which refrains from adopting an unemployment insurance system. This intention is of no importance to us here, however significant it may appear to a court asked to hold the tax unconstitutional because of its essentially non-revenue purpose.¹⁶⁰ This is clearly one case in which Congress, by failing to earmark the proceeds for use in connection with the act, has rendered an attack upon the appropriation clauses difficult.

The P. W. A., set up under Title II of the N. I. R. A.,¹⁶¹ far overshadows any other spending agency in the history of America. But as it has been financed exclusively from the general funds the avenue of attack outlined above has not been open. Counsel have therefore seized upon the ingenious device of attempting to enjoin municipal corporations from accepting its loans and gifts.¹⁶² In the first such suit, brought to prevent construction of a municipal electric system, the private power company sued solely in its capacity as a municipal taxpayer, and lost when it failed to establish any basis for fearing an increased tax burden.¹⁶³ In subsequent cases the petitioning company has been careful to note that it is suing to prevent the city from entering into illegal competition with it, the source of such illegality consisting in the acceptance of tainted federal funds.¹⁶⁴ As there would seem to be merit in the government's contention that the action of the city is legal, regardless of the validity of the federal law,¹⁶⁵ it is entirely possible that the primary purpose of these cases lies in their nuisance value and that they offer little opportunity for contesting the scope of the spending power.¹⁶⁶ Yet it is scarcely conceivable that the validity of the P. W. A.

160. See the discussion of this statute in (1936) 45 YALE L. J. 751.

161. 48 STAT. 200 (1933), 40 U. S. C. A. § 401 et seq. (1935).

162. Of the 31 municipal power projects financed by the P. W. A. down to July, 1935, such injunctions were sought in all but 9 instances. Prentice-Hall, *Fed. Trade & Industry Service* (2d ed. 1935) § 40,024.

163. *Consumer's Power Co. v. City of Allegan*, 71 F. (2d) 477 (C. C. A. 6th, 1934). Cert. denied October 8, 1934.

164. For typical cases see *Arkansas-Mo. Power Co. v. City of Kennett*, 78 F. (2d) 911 (C. C. A. 8th, 1935); *Missouri Utilities Co. v. City of California*, 8 F. Supp. 454 (W. D. Mo. 1934).

165. Cf. the rule followed in the administration of the criminal law, where the illegality of a search and seizure by the officers of one government does not taint the evidence when offered in proof of a crime under the laws of the other. *Weeks v. United States*, 232 U. S. 383 (1914). This and allied doctrines have been carried to such extremes in criminal cases that it would seem strange indeed to hold that the invalidity of a federal appropriation taints the legality of a subsidized municipal project. See Grant, *Immunity from Compulsory Self-Incrimination in a Federal System of Government* (1934-1935) 9 TEMPLE L. Q. 57, 194. Other references will be found in my *Penal Ordinances in California* (1936) 24 CALIF. L. REV. 123.

166. Liberty League lawyers seem to have conceded as much in refusing to appeal the

program can remain immune from judicial scrutiny. Ultimately its contracts with cities regarding the rates to be charged for electrical current furnished from their federally subsidized plants will come before the courts, possibly through an effort on the part of a city to charge higher rates, or in a clash between the contract provisions and the rate regulations of a state. The T. V. A. power program may be contested in a similar way.¹⁶⁷

Although *United States v. Certain Lands in Louisville*,¹⁶⁸ having become moot, has been dismissed at the request of the government, this case is conclusive proof of the superficiality of the conclusion that "the spending power of Congress is beyond the range of judicial attack." P. W. A.,¹⁶⁹ like T. V. A.,¹⁷⁰ is authorized to "acquire . . . by exercise of the power of eminent domain, any real or personal property" necessary to carry out the provisions of the act. Unless desirable projects are to be abandoned, or the administration is to consent to a fleecing at the hands of individuals holding key properties, resort to such proceedings is, in the long run, inevitable. In the *Louisville* case the government sought to acquire certain lands to complete a low-cost housing and slum-clearance project, but as this specific enterprise was defended as a link in a national program of public works to relieve unemployment it would have brought up the entire program of the P. W. A. and W. P. A. for review. And the recent decision in *Ashwander v. T. V. A.*¹⁷¹ demonstrated that when the government attempts to purchase properties from a corporation, rather than from an individual, resort to compulsion through eminent domain proceedings may be unnecessary to enable disgruntled stockholders to contest the validity of this purchase through an attack upon the legality of the project with which it is connected.

It is quite impossible to foresee all of the ways in which the spending programs of the present administration may come before the courts, but certainly there are many others. The power program of the T. V. A.¹⁷² is especially vulnerable in that it purports to disregard the regulatory provisions of the states concerned. Does not this open the door to an action by a power company seeking to enjoin illegal competition? Or to a state, seeking to exclude the T. V. A. from the market? Might not

case of *Ashwander v. City of Florence*, reported together with *T. V. A. v. Ashwander* in 78 F. (2d) 578 (C. C. A. 5th, 1935).

167. The act requires that the wholesale purchasers of the Corporation's power must resell at rates fixed by the Authority's directors. 48 STAT. 65 (1933), 16 U. S. C. A. § 831 (k) (1935). The validity of this clause, even as concerns power developed at the Wilson Dam, was not passed upon in *Ashwander v. T. V. A.*, 56 Sup. Ct. 466 (1936).

168. 78 F. (2d) 684 (C. C. A. 6th, 1935). Cert. granted October 28, 1935; dismissed March 5, 1936.

169. 48 STAT. 202 (1933), 40 U. S. C. A. § 403 (1935).

170. 48 STAT. 67 (1933), 16 U. S. C. A. § 831 (g) (1935).

171. 56 Sup. Ct. 466 (1936). See comment (1936) 45 YALE L. J. 649.

172. See Note (1934) YALE L. J. 815. And see *infra*.

the Comptroller General refuse to accept warrants drawn under an appropriation act which he considers to be unconstitutional,¹⁷³ thus precipitating an action involving even those phases of the spending power which may be, under the present state of the authorities, completely immune from attack at the hands of private persons?

At the same time that it was becoming increasingly evident that the Court would be forced to face the issue of the scope of the national spending power on its merits, the impression was growing that it would be driven to prescribing limits to this power. This was particularly true if it proposed to continue, as in *Hammer v. Dagenhart*,¹⁷⁴ to treat certain time honored powers of the states as in themselves limitations upon the powers of the federal government. The activities of the A. A. A. threatened national regulation of production on a scale beside which the condemned child labor acts paled into insignificance. The T. V. A., if permitted to follow the program thus far worked out, may gain the electric market of the valley, in which case "the state governments of that part of the country will be driven from the recognized field of power regulation."¹⁷⁵ P. W. A. may repeat this feat in the case of the Grand Coulee project and others.

If further action was necessary to bring this issue to a head, it was furnished by the aftermath of *Railroad Retirement Board v. Alton Railway Company*,¹⁷⁶ holding that the commerce power cannot serve as the basis of legislation forcing a compulsory system of retirement pensions upon interstate carriers. There are reasons for suspecting¹⁷⁷ that the real basis of the majority's opinion was a belief that any such act would violate the niceties of due process of law, and hence could not be justified under any power possessed by either government, the explanation that as a regulation of commerce it exceeds the powers of Congress being seized upon merely because it might meet with a greater degree of popular approval. But Congress, instead of directly challenging this

173. "By . . . establishing the General Accounting Office, Congress has constituted the Comptroller General as the authority to determine the legality of expenditures of national monies." H. T. Hunt, General Counsel of P. W. A., P. W. A. Release No. 1507, July 20, 1935, quoted in Prentice-Hall, *op. cit. supra* note 162. If the Comptroller General comes under the rule of *Rathbun v. United States*, 295 U. S. 602 (1935), which would seem reasonable, and is removable only by joint resolution of Congress—a procedure entailing a good deal of publicity—he may be in a position of sufficient security to exercise an independent judgment on such questions. His failure to take any action thus far may be attributed to the conviction of his counsel, doubtless shaken by the *Hoosac Mills* decision, that the national spending power is virtually unlimited. See McGuire, *The New Deal and the Public Money* (1935) 23 GEORGETOWN L. J. 155.

174. 247 U. S. 251 (1918).

175. Note (1934) 43 YALE L. J. 815, 826.

176. 295 U. S. 330 (1935).

177. See the excellent discussion of this case in Powell, *Commerce, Pensions, and Codes* (1935) 49 HARV. L. REV. 1, 193.

portion of the opinion through the passage of an amended act under the commerce power, provided for the payment of pensions directly from the federal treasury, the money to be taken from the general fund.¹⁷⁸ Sponsors of the new act¹⁷⁹ openly confessed to the intention of thus placing it within the rule of *Frothingham v. Mellon* and beyond the reach of judicial review.

Had Congress gone no further its threat would have been but partial, amounting to nothing more than a gift to the railroad industry which would operate to relieve it, at least in part, from the burdens of its voluntary pension systems. But a second act¹⁸⁰ passed at the same time levied special income taxes upon railroad employees and excise taxes, measured by payrolls, upon the carriers. These taxes are to be "paid into the Treasury of the United States as internal-revenue receipts." They are obviously levied to replenish the treasury for the drain of these pensions, but their passage in a separate act which is complete in itself is a clear indication that Congress intends that neither act shall fall because the other is held unconstitutional. The inseparability doctrine of *Pollock v. Farmer's Loan and Trust Co.*¹⁸¹ is therefore not applicable; and as the taxes are not earmarked the Court must find a "constructive" dedication in order to invalidate them as being levied for an unconstitutional purpose. Even then it would be faced with the task of so limiting the scope of the spending power as to invalidate the appropriating of money for pensions.

Of course, it is possible that by the very act of cutting these taxes apart from the pensions Congress has undermined their validity. This is particularly true of those on employees, which would seem to violate the newly-found "equal protection" requirements of the "due process" clause of the Fifth Amendment.¹⁸² More is to be said for the validity of those on carriers, as there are ample grounds for taxing railroads on a different basis than other business enterprises; and if these particular taxes are struck down¹⁸³ they may readily be replaced by other and valid ones. Unless the Court finds some way to invalidate the pension appropriations, therefore, the result may be that the Court's decision under the commerce power will have accomplished nothing except to relieve the employee of his share and shift the entire burden of the pension system to the carrier. If this challenge is successful, Congress

178. 49 STAT. 967, 45 U. S. C. A. § 215 et seq. (1935).

179. See 25 AMER. LABOR LEG. REV. 137 (1935).

180. 49 STAT. 974, 45 U. S. C. A. § 241 et seq. (1935).

181. 158 U. S. 601 (1895).

182. See *Heiner v. Donnan*, 285 U. S. 312 (1932).

183. It would seem particularly difficult to justify exempting all compensation paid in excess of \$300 per month. Of course when the tax is considered in connection with the pension plan the reason is evident, that portion of the salary in excess of this figure not entering into the computation of the pension.

may invade other fields; for there is no reason why such a pension system need be restricted to those branches of industry which are directly engaged in interstate trade, while the wider the tax base the less vulnerable it would be to attack. Indeed, in the Social Security Act¹⁸⁴ Congress has already undertaken a general system of industrial pensions. All that would be necessary to make it into a real retirement act would be to boost the figures. In attempting to stem the tide, the Court invited a deluge.

Here, then, was a direct challenge, comparable to the Child Labor Tax Act of 1919. Would it, like that statute, prove a turning point in the law? Would the Court, in short, after nearly a century and a half of silence, limit the spending power? It has apparently chosen to do so, and in the *Hoosac Mills* case we have the first intimation of the new law which is to govern this important field. But before turning to a detailed analysis of that opinion let us briefly examine the alternatives which presented themselves for choice and which restricted the actual degree of freedom which could be exercised in that decision.

THE MADISON THEORY

The narrowest possible view is that advanced by James Madison in number 41 of *The Federalist*: The spending power of Congress is as broad as, but no broader than, its powers to govern. Under this interpretation, Congress can appropriate money for the "general welfare" only in so far as spending may be incidental to an exercise of its other delegated powers. In short, it denies that the clause is intended to confer an additional substantive power, and treats it solely as an express indication that in establishing post offices and post roads, providing and maintaining a navy, or calling forth the militia "to execute the laws of the Union, suppress insurrections and repel invasions," it may back up its laws with the purse.

When this is reduced to its elements, the doctrine would seem open to the criticism that it reduces the phrase to "mere tautology,"¹⁸⁵ since any grant of substantive power would obviously seem to carry with it a right to spend the necessary money to carry it into effect. But the Madison rule is based upon the assumption that this clause is essentially a *taxing* rather than a spending one, intended to permit the national government to raise its own funds without relying upon state action. Viewed in this light the clause, even though narrowly construed, takes on new importance, for no such power was vested in the central government under the Articles of Confederation. The argument then proceeds: the phrase "common defense and general welfare" was borrowed from the Articles of Confederation,¹⁸⁶ where it was never considered

184. 49 STAT. 636, 42 U. S. C. A. §§ 1001-1011 (1935).

185. *United States v. Butler*, 56 Sup. Ct. 312, 319 (1936).

186. Art 8, where *or* was used rather than *and*.

to confer power to spend for *non-federal*¹⁸⁷ purposes, and should receive a similar construction in the new document;¹⁸⁸ no broader claims were made for it prior to ratification;¹⁸⁹ according to settled rules of constitutional and statutory construction, a general clause is qualified by the specific enumeration of powers which follows;¹⁹⁰ a broader construction, in keeping with the normal import of the words "general welfare," would be inconsistent with the limited type of central government which the Constitution purported to establish.¹⁹¹

This view is not to be too lightly brushed aside. From the time of the Constitutional Convention until today it has had the support of eminent constitutional lawyers and statesmen.¹⁹² Even such a thorough-going Hamiltonian as Professor Corwin concedes, "That a majority of the Court has been inclined generally to regard Madison's interpretation as the theoretically correct one, seems not improbable."¹⁹³ It certainly has the advantages of simplicity and definiteness, and avoids the seemingly incongruous situation which invites Congress to accomplish results through the purse which it is powerless to command, thus, in the name of the Constitution, requiring the expensive rather than the practical. And of course it would furnish an easy solution to such a challenge as that presented by the Railroad Retirement Act. For the conclusion that the establishment of a pension system does, or does not, exceed the power of Congress to regulate commerce would automatically settle its status under the spending power.

187. Throughout this paper the term "non-federal" is used to designate expenditures which cannot be justified on any of the powers of Congress save the spending power. If it is incidental to one of the normal powers of Congress, it is for a *federal* purpose. Consequently neither, to other than a Madisonian, carries any stigma of unconstitutionality.

188. 9 WRITINGS OF JAMES MADISON (Hunt ed. 1910) 411, 418; 6 *id.* 341, 354.

189. See Post, *The Constitutionality of Government Spending for the General Welfare* (1935) 22 VA. L. REV. 1, 3-4, where much is made of this argument.

190. 6 WRITINGS OF JAMES MADISON (Hunt ed. 1910) 341, 355.

191. 15 WRITINGS OF THOMAS JEFFERSON (Library ed. 1910) 133.

192. The authorities are collected in Post, cited *supra* note 189. See also: WARREN, CONGRESS AS SANTA CLAUS (1932) 6-9; BECK, OUR WONDERLAND OF BUREAUCRACY (1932) 24, and recent statements of Liberty League lawyers. Mr. Beck laments, "In no objective did the Constitutional Convention more singularly fail than in this. In attempting to limit the power of expenditure the Constitution made possible an interpretation which has given to the power of expenditure an unlimited scope." *Loc. cit.* It is interesting to contrast Mr. Beck *out* with Mr. Beck *in*, for as Solicitor General he was a leading contributor to this "singular failure." In 1923 he argued, "The grant of power to tax and appropriate in the first clause of section 8, is distinct from the grants of power in each of the other sixteen clauses of that section, and there is nothing in the sweeping term 'to provide for . . . the general welfare' to show that the power to appropriate money was given merely in aid of the grants in those other clauses." *Massachusetts v. Mellon*, 262 U. S. 447, 456 (1923). Doubtless as a Liberty League attorney he has often lamented his success in that case in rendering it so difficult to contest the validity of an appropriation.

193. TWILIGHT OF THE SUPREME COURT (1934) 174.

Judicial review suffers from the fact that it is purely negative, and often comes into play so late that history, rather than law, is the decisive factor. Had the judges faced this issue in the early days of the Union, they might well have adopted the Madison construction. But a century and a half of "general welfare" spending was more than any court could undo. What would become of the Public Health Service? The Bureau of Education? The Geological and Geodetic Surveys? The Fisheries Bureau? The Bureau of Mines? Possibly many (but certainly far from all) of the functions of the Department of Commerce can be tied to the commerce power, but can the same be said of the Department of Labor,¹⁹⁴ with its Women's and Children's bureaus, the Department of Agriculture, or even the R. F. C.? Few of the activities of the Census Bureau have to do with an "enumeration" to serve as the basis for congressional reapportionment.¹⁹⁵ And the A. A. A. aside, would the farmer¹⁹⁶ surrender his agricultural statistics, his seed loans, his federally subsidized county agent or agricultural experiment station, or even his "farmer's bulletins" on how to remove ink spots from clothing or exterminate termites? Long before 1936, the Madison construction had forfeited its right to a hearing. To this extent the forces of history had molded the law.

THE HAMILTON THEORY

There is no logical stopping point between the view of Madison and that of Hamilton, perhaps best stated by the converted Democrat, Monroe:

"My idea is that Congress have an unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate it to purposes of common defense, and of general, not local, national, not state, benefit."¹⁹⁷

This construction is based upon a literal interpretation of the words used, and erects the spending power into a distinct, substantive power rather than a mere means of carrying out the other delegated powers.

Such an interpretation leaves plenty of room for a judicial check upon

194. The Court has stated that the "normal function" of this Department is not the regulation of interstate commerce, but "the advancement and protection of the welfare of the workers." *Child Labor Tax Case*, 259 U. S. 20, 37 (1922).

195. As to the difficulties encountered in attempting to justify its numerous activities on the basis of other express powers aside from the spending power, see *F. T. C. v. Claire Furniture Co.*, 274 U. S. 160 (1927).

196. An excellent summary of the growth of federal expenditures in aid of agriculture is given in a 1920 brief by Chas. E. Hughes, reprinted in 72 *CONG. REC.* 7890 (1930). Such aid had been recommended by President Washington. 1 *RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS* (1897) 202.

197. 2 *id.* at 173.

Congressional spending. Is the money appropriated for a "public purpose"? Is it for the "general welfare"? When appropriating for *non-federal*¹⁹⁸ purposes, can the government merely subsidize others, or can it build, supervise, and operate? If the latter is permissible, does it enter upon such activities as a superior government, with the power of eminent domain and the right to proceed in violation of the laws of the states? How far can it go in building a regulatory system upon a spending base? These questions must be considered in turn. In large part they still remain unanswered.

Public Purpose. In a series of cases, of which *Loan Association v. Topeka*¹⁹⁹ is perhaps the most typical, the Supreme Court showed an intention to make the test of "public purpose" an effective check upon the fiscal power, even resting its rulings, in the absence of express constitutional limitations, upon the dictates of natural justice and the nature of the social compact. Later this requirement was found to be one of the many demanded by "due process of law,"²⁰⁰ and as such is equally binding upon the nation and the states. A 1935 Massachusetts decision,²⁰¹ holding that the state cannot, through mortgage loans, aid in the construction and repair of private homes, shows that the doctrine is still alive and flourishing in some courts. Although the liberal tradition established by recent Supreme Court cases, capped by *Green v. Frazier*,²⁰² shows that it is decidedly on the wane, the history of "due process" demonstrates that such rules can be readily resuscitated. If the Court chooses to do so, ample precedents are available to embarrass many of the present undertakings of the national government. The recent *Massachusetts* case²⁰³ would seem to cast a shadow of doubt upon the H.O.L.A. *Lowell v. Boston*²⁰⁴ even forbade construction loans to persons whose homes had been destroyed by the Boston fire. Seed loans have been forbidden.²⁰⁵ The N.Y.A. would be interested in a ruling that public funds cannot be used to support needy university students.²⁰⁶ And in 1891 the Supreme Court, in a ruling²⁰⁷ sustaining the right of a

198. See *supra* note 187, for the meaning attached to this term throughout this paper.

199. 20 Wall. 655 (U. S. 1874).

200. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (1896); *Green v. Frazier*, 253 U. S. 233 (1920). See *McBain, Taxation for a Private Purpose* (1914) 29 POL. SCI. QUAR. 185; *McAllister, Public Purpose in Taxation* (1930) 18 CALIF. L. REV. 137, 241.

201. Opinion of the Justices, 195 N. E. 897 (1935).

202. 253 U. S. 233 (1920). And see *Jones v. City of Portland*, 245 U. S. 217 (1917) (sustaining municipal retail fuel yards) and *Standard Oil Co. v. City of Lincoln*, 275 U. S. 504 (1927) (sustaining a city-owned gasoline station).

203. Opinion of the Justices, 195 N. E. 897 (1935).

204. 111 Mass. 454 (1873).

205. *State v. Osawkee Township*, 14 Kan. 418 (1875). *Contra*, *State v. Nelson County*, 1 N. D. 88 (1890).

206. *State v. Snitzler*, 143 Mo. 287 (1898).

207. *Kaukauna Water Power Co. v. Canal Co.*, 142 U. S. 254, 272 (1891).

state government to sell power necessarily produced in the course of an undertaking to improve navigation, wrote:

"The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for a public improvement a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement."

The fact that this doctrine has never been applied against Congress is only mildly persuasive. Neither had the doctrine that legislative powers cannot be delegated, until the *N. I. R. A.* cases. If a statement in the *T. V. A.* opinion²⁰⁸ means what it would seem to mean, a majority stands ready to apply the test of "public purpose."

"The government rightly conceded at the bar, in substance," the Chief Justice wrote, "that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States."

This would seem to be a clear acceptance of the view of 1891. Only the added conclusion that the case involved the creation of a "wholly unnecessary excess of water" was necessary to invalidate the project.²⁰⁹

Of course the statement, thus construed, is quite out of keeping with the generally accepted view that the production and distribution of electricity is a legitimate function of government. If applied against the nation under the Fifth Amendment, should it not be applied against the states under the Fourteenth?²¹⁰ One need only vision the consequences, to doubt that this will be done; yet the context in which the sentence appears seems to demand such a construction. There is a possibility, however, that the Court had in mind the view that the construction and operation of a hydro-electric power system, even on such a gigantic scale as that contemplated in the Tennessee Valley, would be for a local or regional purpose, and hence, although valid as a governmental enterprise, is invalid as a national one.²¹¹ If so, it shows how

208. *Ashwander v. T. V. A.*, 56 Sup. Ct. 466, 480 (1936).

209. See the dissenting opinion of McReynolds, J., who insisted that the government was merely "pretending to act within (its) powers to improve navigation . . . The record leaves no room for reasonable doubt that the primary purpose was to put the Federal Government into the business of distributing and selling electric power." *Id.* at 489. His position would have been stronger had the case involved other than the Wilson dam, and the issue may have to be faced on its merits in a later suit involving, say, the Norris Dam project.

210. But see the following paragraph.

211. For a third possible interpretation, see *infra*.

this second test may readily be used to supplement the first to accomplish "due process" results.

A statement which occurs a few paragraphs earlier in this opinion is even more interesting. Pointing out that all federal undertakings "must be consistent with the foundation principles of our dual system of government," it intimates that probably Congress

"could not establish a steel mill and make and sell steel products, or a factory to manufacture clothing or shoes for the public, and thus attempt to make its ownership of energy, generated at its dam, a means of carrying on competitive commercial enterprises and thus drawing to the Federal Government the conduct and management of business having no relation to the purposes for which the Federal Government was established."

The closing phrase is pregnant with possibilities. Is it to become a test of "national public purpose"? If so, will it be construed to include, as one of the "purposes for which the Federal Government was established," spending for the "general welfare"? Such a construction would, of course, render it mere tautology, adding nothing to the normal "public purpose" doctrine. On the other hand, if it is construed to include only *federal* functions it will, if pushed to its logical extreme, give us the Madison rule so far as "the conduct and management of business" is concerned. In any case it is further evidence that the doctrine of "public purpose" is far from obsolete.

General Welfare. Whatever may be said of the other possible tests, by the very language of the spending clause an appropriation must be for the "*general welfare*." This would seem to imply that there must be some possibility that the spending will enure to national rather than merely local advantage. It may have a legitimate public purpose, and still be so restricted in its effects as to promise, to paraphrase Monroe,²¹² only local, not general, state, not national, benefit. As such it would be invalid.

Just how great an area, or how large a proportion of the population, must be benefited to comply with this test remains a virgin question. Does it justify a low-cost housing project in Louisville? Or a P. W. A. project constructing a Greek theatre on a state university campus? A pick-and-shovel smoothing of a rain-washed hillside on a city street? Viewed as separate undertakings, all such projects would clearly fail to meet its requirements. Considered as links in a single nationwide program of public works to relieve unemployment they would as clearly seem to be valid. Other types of undertakings, such as efforts to eliminate the wheat rust or the boll weevil, to finance farmers in an area suffering from drouth, or to aid in the developing of new crops in areas in which former standard ones are temporarily or permanently out of

212. 2 RICHARDSON, *op. cit. supra* note 196 at 173. And see HAMILTON, 3 WORKS (Lodge ed. 1885-6) 250.

the question, are of greatest importance to the afflicted areas, but have far reaching implications for the entire nation. Their validity would not seem open to question. The fact that the primary benefits may be to particular classes rather than to particular areas, as in the case of the R. F. C., would not seem to alter the question materially.

It has been suggested that the application of this test is a political, and not a judicial, matter; that its very indefiniteness renders it unfit as a criterion of judicial decision. Certainly it permits of a check as sweeping and flexible as that under the "reasonableness" test of due process, and if applied with as heavy a hand would place a tremendous burden upon an already overworked bench. Professor Corwin,²¹³ for example, poses the difficulties of deciding if the Boston Navy Yard is for the *general* welfare. But this view overlooks the probability of the Court's adopting a companion rule that an appropriation incidental to a *federal* function is necessarily, in constitutional contemplation, for the general welfare, thus narrowing the field of doubt to those which are for *non-federal* purposes. Within this realm it seems safe to predict a rôle for the "general welfare" test quite similar to that of "public purpose": omnipresent, but normally quiescent.²¹⁴

Government Construction or Operation. It has been suggested that only *federal* functions can be carried on by the national government; that it can subsidize state or private agencies performing *non-federal* services, but cannot itself construct, operate, or administer such undertakings. The contrary view, it is said, "would be wholly inconsistent with the character of the national government."²¹⁵

I must confess my inability to present the case for this view, being utterly unable to see any basis upon which it can be rested. Why does authority to "provide for the general welfare" include power to advance that welfare through paying others to perform services, but not through performing them? Furthermore, this suggestion, like the Madison rule, proves too much. The departments of Agriculture, Commerce, and Labor, the bureaus of Census, Fisheries, and Mines, the Geological and Geodetic Surveys, and the Smithsonian Institute, among others, are national institutions, and not subsidized state or private agencies. The Department of Agriculture does its own research; the Bureau of the Census collects its own materials, and prepares its own reports. The

213. Corwin, *The Spending Power of Congress* (1923) 36 HARV. L. REV. 548, 576.

214. Is such a view foreshadowed by the following statement in the *Hoosac Mills* opinion? "When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. How great is the extent of that range, when the subject is the promotion of the general welfare of the United States, we need hardly remark." 56 Sup. Ct. 320 (1936).

215. Note (1935) 48 HARV. L. REV. 806, 809. And see Clothier, *The Federal Water Power Program* (1935) 84 U. OF PA. L. REV. 1, 23.

adoption of any such rule would seem to be out of the question today.

Nor would this rule seem to find any support in the cases. To be sure, the quotations given above from the *T. V. A.* opinion might possibly be construed as embracing such a view; but can anyone imagine counsel for the government, with *United States v. Certain Lands in Louisville*²¹⁶ pending, conceding, even "in substance," the correctness of such a rule? Would the Court have passed upon it in this off-hand manner, without argument? It seems far more logical to conclude that it was still contending, as on the previous page, that the undertaking "must be one adopted in the public interest as distinguished from private or personal ends."

Governmental Powers and Non-Federal Spending. Perhaps more is to be said for the qualified form of this rule: When the nation undertakes to spend for a *non-federal* purpose, it steps down from its position as a government and becomes subject to the laws of the states. Such a view was ardently championed by Monroe,²¹⁷ who reasoned:

"The right of appropriation is nothing more than a right to apply the public's money to this or that purpose. It has no incidental power, nor does it draw after it any consequence of any kind. All that Congress could do under it in the case of internal improvements would be to appropriate the money necessary to make them. For every act requiring legislative sanction or support the state authority must be relied on. The condemnation of the land, if the proprietor should refuse to sell it, the establishment of turnpikes and tolls, and the protection of the work when finished must be done by the state. To these purposes the powers of the general government are believed to be utterly incompetent."

Possibly it is a hesitation to face the challenge of this view that has led the Court to use the "regulation of navigation" as a back door method of validating such power programs as those of the Colorado and Tennessee river basins. The effect on such programs is evident, and if applied to the major portion of the *T. V. A.* program, as is still possible under the *Ashwander* decision,²¹⁸ may be little short of disastrous. The major Colorado River dams could not have been constructed without the consent of Arizona, which would have hopelessly deadlocked that project. The power could not be sold without a certificate of convenience and necessity from the state, and the rates to be charged and the services to be rendered would be subject to state regulation. Especially in the case of the *T. V. A.*, this might lead to a vicious political struggle between an agency of the national government and the private

216. 78 F. (2d) 684 (C. C. A. 6th, 1935). Cert. granted October 28, 1935; dismissed March 5, 1936. There is nothing to indicate that at that time there was any intention of abandoning this case.

217. 2 RICHARDSON, op. cit. *supra* note 196, at 168.

218. 56 Sup. Ct. 466 (1936).

power companies for control of key state positions; a struggle in which the former might well emerge victorious. Surely such a situation is not to be encouraged in the name of "the rights of the states," for it is a far more serious threat to them than any power program could possibly be.

There is the added difficulty that a single project may be in part *non-federal* and in part *federal*. Where a dam is essentially for power purposes but incidentally improves navigation, as in the case of several T. V. A. dams which have not yet come before the Court, one attempting to apply the Monroe rule would be faced with a set of facts defying unscrambling. Where is the line dividing the *non-federal* from the *federal* phases of the project? Some sales should be exempt from state regulation; which ones? If all are to be held subject to local control, the national government would be hamstrung in the conduct of its legitimate functions in defiance of the principle of "national supremacy." But if the intermingling of a *federal* purpose, however slight, is taken to raise the entire project to the level of a *federal* one, the Monroe rule could easily be evaded on a grand scale. Perhaps one so easily evaded is not worth establishing.

If I am correct in assuming that the Court shrinks from such a rule, it is certain that it will not adopt it if a more satisfactory alternative is equally defensible. And Professor Corwin²¹⁹ has shown that Monroe's doctrine is really nothing more than wishful thinking to bridge the gap between his state's rights philosophy and his conversion to a Hamiltonian construction of the spending power. His theory that an exercise of the power of eminent domain requires the consent of the state was not contingent upon the spending being for a *non-federal* purpose; he felt it to be equally necessary if the nation sought land for a post office.²²⁰ Hence *Kohlt v. United States*²²¹ undermined whatever legal standing it may have had. Furthermore, to whatever extent *United States v. Gettysburg Electric Ry. Co.*,²²² is to be classed as a "general welfare" case, it is express authority for the rule that this power carries with it the power of eminent domain. And if this be true, why does it not carry with it all other governmental powers as well? It is difficult to conceive of a nation whose word, when constitutional, is the "supreme law of the land," being treated as a private party, subject to the whims of the states.

Spending to Regulate. "The power to tax involves the power to de-

219. Corwin, *Constitutional Aspects of Federal Housing* (1935) 84 U. OF PA. L. REV. 131, 142-143.

220. 2 RICHARDSON, op. cit. *supra* note 196, at 157-161. And see Corwin, cited *supra* note 219.

221. 91 U. S. 367, 372-3 (1875).

222. 160 U. S. 668 (1896). See (1936) 45 YALE L. J. 751.

stroy." And the power to spend involves the power to control. Just as there can be no tax which does not have non-revenue consequences, so there can be no such thing as spending solely for the sake of putting money into circulation. Perhaps the closest approximation of recent years to a pure spending spree was the make-work program of the Partial Workers' Administration. Yet it inevitably was also a means for the redistribution of wealth, and was intended to be such.

When one turns to the self-liquidating projects he realizes that "the distinction between the power to legislate on a certain subject and the power to appropriate for it, is narrow if existent at all."²²³ The aid given to the construction or expansion of municipal electric systems has done more to advance the cause of public ownership than many statutes frankly intended to have such effect. If the T. V. A. is permitted to carry out its program unmolested, electric rates in the valley will necessarily be driven down and down. The fancy system of bookkeeping open to the authority²²⁴ may enable it to carry this process to an extreme seriously embarrassing to its privately owned competitors. In such a case it will be idle to reason that legal authority to regulate the rates charged by such private companies rests solely in the states. No doubt these companies will have lost all interest in the law and centered their attention upon the facts of economics. Nor is government construction and operation of public works necessary to such a conclusion. Congress, through the device of grants-in-aid to the states,²²⁵ has been legislating on such subjects as highway construction and education for years. In its grants to foster vocational rehabilitation and maternal and infant hygiene it entered the broad realm of social legislation, and in the Social Security²²⁶ and the Railroad Retirement²²⁷ acts of last year it has invaded the sphere of labor legislation on a grand scale. Even the control possibilities of the R. F. C. became evident long ago, although at heart it is but a lending agency.

One point is clear. In conjunction with the levying of a tax, the nation cannot impose regulations which have no necessary connection with the collection of the funds.²²⁸ So in spending money for the advancement of the general welfare, it cannot impose regulations which have no necessary connection with the general welfare to be thus advanced. If the sole ground upon which P. W. A. and W. P. A. loans for the construction of municipal power plants is to be defended is that they are links in a national scheme of public works to relieve unemployment, the con-

223. Clothier, *op. cit.* *supra* note 215.

224. See Note (1934) 43 YALE L. J. 815, 823.

225. See MACDONALD, *FEDERAL AID* (1928).

226. 49 STAT. 619, 42 U. S. C. A. § 301 (1935).

227. 49 STAT. 967, 45 U. S. C. A. § 215 (1935).

228. *Linder v. United States*, 268 U. S. 5 (1925).

tracts which the government requires²²⁹ whereby the city binds itself to follow certain accounting methods and charge low rates are undoubtedly void. If the T. V. A. is to be sustained only in terms of navigation and national defense, it would seem equally difficult to defend the clause in the act²³⁰ requiring wholesale purchasers of the Corporation's power to resell at rates fixed by the Authority's directors. But if it is through the establishment of a number of municipally owned yard-stick plants, and of a gigantic nationally owned and operated project furnishing cheap power to a large number of retail consumers, that the "general welfare" is to be promoted, more is to be said in defense of these rate requirements.

Would the Court draw a second parallel between taxation and spending? An alleged "tax," we have seen, may be invalid because its purpose is not to raise revenue, but to regulate. May an appropriation be invalid because its real purpose is not to spend, but to control? The theory of the tax cases is that the act is invalid because the "tax" is not a tax at all, but a penalty for doing a forbidden act; hence the test is that of constitutional power to forbid this act outright. May an alleged "spending" actually be but a series of bribes to secure the performance of desired acts or the omission of undesired ones, the test of validity being that of constitutional power to demand or forbid these acts forthwith?

Such a possibility faced two difficulties. First, the parallel is more apparent than real. The raising of revenue is the sole constitutional purpose of the power to tax. Whatever other powers are necessarily incident to it are purely the consequences of economic fact rather than of constitutional desire. But spending is not the sole constitutional purpose of the power to appropriate. In fact, mere spending *qua* spending would be unconstitutional per se; it must be spending "to promote the general welfare." Secondly, the Court, in a statement obviously intended to be far more than a dictum, had apparently faced this contention and expressly rejected it. In *Massachusetts v. Mellon*²³¹ counsel for Massachusetts argued that a conditional grant-in-aid "imposed upon the states an illegal and unconstitutional option either to yield to the federal government a part of their reserved rights or lose their share of the moneys appropriated," and had been passed by Congress with the "ulterior purpose . . . to induce the states to yield a portion of their sovereign rights." But a unanimous court, in an opinion by Mr. Justice Sutherland, replied:

"Probably, it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation but simply

229. See *Washington Water Power Co. v. City of Coeur d'Alene*, 9 F. Supp. 263, 271 (N. D. Idaho 1934).

230. See *supra* note 167.

231. 262 U. S. 447, 480, 482 (1923).

extends an option which the state is free to accept or reject. . . . If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding."

Even the fact that non-cooperating states would find their resources drained by federal taxes to supply the funds necessary to pay the grants to states which did yield was not sufficient to convince the judges that an appropriation is none the less an appropriation because it is a bribe.

Yet neither of these hurdles proved stumbling blocks in the *Hoosac Mills* case. The majority took each in stride. The spending power, it seems, is to be limited; and regardless of the elementary principles of logic, this is to be done in such a way as to preserve a semblance of the dogma of *Kidd v. Pearson*,²³² *Hammer v. Dagenhart*,²³³ and *Bailey v. Drexel Furniture Co.*:²³⁴ there is no commerce in production, nor is there any other normal avenue whereby the national government can invade this sacred domain of the states.

THE HOOSAC MILLS CASE²³⁵

The Court unanimously bowed to the inevitable, and rejected the Madison doctrine. The first clause of Article I, section 8, Mr. Justice Roberts wrote for the majority,

"Confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress subsequently has a substantive power to . . . appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States."

The dissenting judges, through Mr. Justice Stone, concurred. "The spending power of Congress," he wrote, "is in addition to the legislative power and not subordinate to it." But there was sharp disagreement the moment that they undertook to apply this rule to the facts before them.²³⁶

There are reasons for believing that the majority considered that the act violated a basic doctrine of due process. "The sole object of the legislation," they stated, "is to . . . take money from the processor and bestow it upon farmers. . . ." Again, it is at heart, "The expropriation of money from one group for the benefit of another." One is im-

232. 128 U. S. 1 (1888).

233. 247 U. S. 251 (1918).

234. 259 U. S. 20 (1922). These cases were discussed in (1936) 45 YALE L. J. 751.

235. *United States v. Butler*, 56 Sup. Ct. 312 (1936). Only so much of the opinion as concerns the constitutional limits of the spending power will be considered here. Its bearing upon the question: Who can contest the validity of an appropriation? was discussed in (1936) 45 YALE L. J. 772. The taxation aspects of the case were discussed *id.* at 756.

236. Perhaps it would be more accurate to say that the disagreement arose because of the refusal of the majority to apply it. See *infra*.

mediately reminded of the statement in *Loan Association v. Topeka*:²³⁷

"There are limitations . . . which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted . . . that the homestead now owned by A should no longer be his, but should henceforth be the property of B."

Change *homestead* to *money* and the parallel is complete; and the *Topeka* case, it will be recalled, involved bonds and not homesteads. Nor would it matter if Congress were subsequently to switch the support of the A. A. A. from processing taxes to the general fund, as this would merely increase the number of persons whose property was thus illegally expropriated for a private, rather than public, purpose.

The difficulty with this argument is that it might not have proved acceptable to the American public. After all, did not "The First American" commend agriculture to the consideration of Congress, advising that aid and encouragement be extended to it?²³⁸ Did not Hamilton himself, whose views had just been accepted by the Court, state that "there seems to be no room for doubt that whatever concerns the general interests of . . . agriculture . . . are within the sphere of the national council, as far as regards an application of money"?²³⁹ Possibly the majority considered it more politic to rule, not that such encouragement as the A. A. A. program involved is not a proper function of government, but that it is not a proper function of the national government, thus switching its ruling from a rejection of the claims of agriculture to a defense of the rights of the states.²⁴⁰

In explaining why this statute constituted an invasion of the reserved rights of the states, the majority has given us one of the most interesting studies in legal dialectic to be found in the entire history of this august tribunal. It starts with the statement that the *only* limitation upon the spending power is that the money be appropriated "to provide for the general welfare of the United States," from which it would seem

237. 20 Wall. 655, 663 (U. S. 1874).

238. See President Washington's eighth annual address to Congress, 1 RICHARDSON, *op. cit. supra* note 196, at 199, 202.

239. 4 WORKS (Lodge ed., 1885-6) 151.

240. The same technique was followed, in an opinion by the same judge, in *Railroad Retirement Board v. Alton Ry. Co.*, 295 U. S. 330 (1935). Quaere, had that case involved an attempt on the part of a state to force a pension system upon "carriers subject to the Interstate Commerce Act," would the statute have been struck down as a "burden upon interstate commerce" which could only be imposed by Congress or with its express [consent?]. For an example of the latter technique, see *Wabash etc. Ry. Co. v. Illinois*, 118 U. S. 557 (1886), qualifying, *sub silentio*, *The Granger Cases*, 94 U. S. 155, 164, 179, 180 (1876) on the road to their ultimate complete reversal in *Smyth v. Ames*, 169 U. S. 466 (1898).

to follow that the sole question is: Are *these* appropriations for the general welfare? But it never answered that question, at least directly. It did, however, discuss several others, and it is from these asides that we must gather what we can to mark out the present law.

The first purported discussion is nothing more than a constant reiteration, frequently by way of quotations, of the obvious fact that the spending power is restricted to the "general welfare," and adds nothing to the argument.²⁴¹ This would seem to be preparatory to an attack upon the question: Does this act appropriate money to advance the national, or only local, welfare? Instead, the discussion comes to an abrupt stop with the surprising statement—one of the most surprising in this or any other opinion—

"We are not now required to ascertain the scope of the phrase 'general welfare of the United States' or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved power of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. . . . Powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden."

One is reminded of the opinion in the first *Child Labor Case*:²⁴²

"The Act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter . . . entrusted to local authority."

Now there is not here two conclusions, but two ways of stating the same one. To say that a creek is north of an east-west boundary line is tantamount to saying that it is not south; to add, "and furthermore, it is not south," simply increases the number of words. The reserved powers of the states are merely those which have not been delegated to the nation. There would seem to be no other possible definition of them. Certainly the Tenth Amendment²⁴³ gives none. Consequently, there is only one way to prove that a power is vested exclusively in the states, and that is to prove that it has not been delegated to the nation. The reasoning can never be reversed, for the mere fact that it has been so delegated is conclusive proof that it is not a reserved power.

In the *Child Labor Case* the Court apparently realized this. At least it was careful to point out in detail why, in its opinion, the act exceeded

241. 56 Sup. Ct. 319 (1936).

242. *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

243. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

the commerce power. It did not say that it need not do this because, even if within the commerce power, it was beyond the scope of federal authority because it was an invasion of the exclusive powers of the states. But now we are told that the spending power "is not limited by the direct grants of legislative power," and hence, we assume, is not restricted to interstate commerce or necessarily excluded from the field of production; that the power to regulate interstate commerce does not include the power to control agricultural production, which power is therefore vested exclusively in the states; that it follows that the spending power cannot be used to control agricultural production. The difficulty is that this is not logic. There is no syllogism. The conclusion might do violence to the major premise.

One refuses to believe that the majority could have meant what its words appear to imply. It seems more reasonable to assume that the idea in back of this paragraph is not that the "reserved rights of the states," measured by the *normal* powers of the federal government, set limits to the spending power, but that in its opinion there was something about this statute which deprived it of its status as a true appropriation act and rendered it a regulatory one, to be tested, therefore, by the "direct grants of legislative power" to Congress. This assumption appears to be borne out by the discussion which immediately follows, which purports to find a parallel between the tax cases²⁴⁴ and the issue presented by the spending power.

"If the taxing power," the Court states, "may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? . . . Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action."

This escape from one logical difficulty only brings us face to face with another. As pointed out above, the alleged parallel of the tax cases is a fallacious one. If it is true, as it clearly is, that an appropriation is only valid if it is made "to promote the general welfare," it would seem

244. All of those cited have been discussed in the earlier parts of this paper. See *Child Labor Tax Case*, *Hill v. Wallace*, *United States v. Constantine*, and *Linder v. United States*, all *supra* notes 49, 53, 55, and 228, respectively. The opinion also quoted Marshall's statement in *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824): "Congress is not empowered to tax for those purposes which are within the exclusive province of the states." But as pointed out in (1936) 45 YALE L. J. 767, this quotation is utterly meaningless when used in connection with the scope of the spending power, and even as a definition of the taxing power it clearly includes the right to raise revenue to support any *non-federal* undertakings which may be within the scope of the spending power.

that it is invalid unless it "induces" acts which promote this welfare. To condemn it for accomplishing what it must accomplish to be valid is harsh indeed. That is to secure the aims of Madison in the names of Hamilton and Story.²⁴⁵

The majority seems to have appreciated this fact, for it hedged on its definition of "induce." There are four separate portions of the opinion dealing with this concept. The first concerns coercive action; the second, mere bribery; the third, contractual agreements to accept federal regulation in return for a bribe or to escape a "penalty." The fourth, concerned with "conditional appropriations," is primarily important because it would seem to question everything that is said relative to the second if not also to the first.

Replying to the government's contention that "whatever might be said against the validity of the plan, if compulsory, it is constitutionally sound because the end is accomplished by voluntary cooperation," Mr. Justice Roberts wrote:

"The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. . . . This is coercion by economic pressure. The asserted power of choice is illusory."

Is it not a little strange that this paragraph makes no mention of *Massachusetts v. Mellon*?²⁴⁶ Surely counsel for the Hoosac Mills remembered that case well, as its doctrine of "proper parties" to contest an appropriation has proved so embarrassing to him and to his colleagues, one of whom argued it so successfully for the government. It was there that a unanimous court, it will be recalled, in an opinion written by one of the present majority, stated: "If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." The only reference to such a doctrine in the instant case occurs in the dissent: "Threat of loss, not hope of gain, is the essence of economic coercion."

The second half of the argument seems especially peculiar and out of place. How could the withholding of the benefit destroy? Does the Court mean to imply that in striking down the statute it was acting to destroy the American farmer? One refusing such a bonus may be

245. This view is presented so adequately in the dissenting opinion that it would be idle to discuss it further here.

246. 262 U. S. 447 (1923).

worse off for doing so, but hardly worse off than if it had never been offered. Obviously the majority was thinking of a different set of economic facts, having in mind a bonus for growing cotton rather than one for not growing it. "Those who receive payments will be able to undersell him." No, they were paid for withdrawing their land from cultivation, thus withdrawing a part of their normal crop from competition with his.

"There is nothing to indicate that those who accepted benefits were impelled by fear of lower prices if they did not accept or that at any stage in the operation of the plan a farmer could say whether, apart from the certainty of cash payments at specified times, the advantage would lie with curtailment of production plus compensation, rather than with the same or increased acreage plus the expected rise in prices which actually occurred."²⁴⁷

The detailed discussion of the *Frost* case,²⁴⁸ which is apparently intended to clinch this argument, is particularly out of point except as it serves to distinguish the facts of the instant case from a real example of economic coercion. There the petitioner was required to become a public carrier or go out of business. He was categorically denied the right to continue his occupation as a private carrier. The Court correctly stated that he was "given no choice, except . . . between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." But the farmer could disregard the A. A. A. and continue as he had always done. Nor could anything be done to prevent him from expanding his activities. And in doing so, he was benefited, rather than injured, by his competitors, yielding to the seductive charm of rental and bonus payments.

Having found "coercion" to exist, it was really unnecessary to discuss what would be done in its absence. Yet the majority did not hesitate to face the issue squarely.

"But if the plan were one for purely voluntary cooperation," they stated, "it would stand no better so far as federal power is concerned. At best, it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states. . . . Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance."

What does this leave of the doctrine of *Massachusetts v. Mellon*? Is the theory of that case overruled, or is it to be legal to bribe a state but illegal to bribe a citizen? If so, we may ultimately end up with a

247. Dissent of Stone, Brandeis, and Cardozo, J. J., 56 Sup. Ct. 326 (1936).

248. *Frost and Frost Trucking Co. v. Rr. Commission*, 271 U. S. 583 (1926), discussed at 56 Sup. Ct. 322.

Hamiltonian rule governing federal grants-in-aid to the states and a close approximation of the Madisonian doctrine governing direct relations between the nation and their citizens. It is difficult to see any juristic basis for such a distinction, particularly in view of the facts of the two cases. Massachusetts, if it exercised its rights to refuse to yield, clearly stood to be injured by the statute. Every time a sister state yielded the extent of this injury was enhanced. But under the A. A. A. non-cooperating farmers were not injured, but benefited. Every time a fellow farmer yielded, the extent of their benefit was enhanced. Yet the rule might prove to be a workable one, and it is possible that the majority has taken it under advisement for further consideration.

One would normally assume that by this time the Court had disposed of the question of the validity of the statute. Instead, it raises a third objection: the money is spent pursuant to "contracts which are not within federal power."

"We are not here concerned," it states, "with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. . . . The tax is appropriated to be expended only in payment under contracts whereby the parties bind themselves to regulation by the federal government. There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."

Is this new factor intended as a cumulative objection to the act, or as an explanation of when the first two are operative? The dissenting judges, apparently fearing the worse, accept the former view.

"The limitation now sanctioned," they insist, "must lead to absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed or even planted at all. The government may give money to the unemployed, but may not ask that those who get it shall . . . use it to support their families. . . . It may spend its money for the suppression of the boll weevil, but may not compensate the farmers for suspending the growth of cotton in the infected areas. . . . It may support rural schools, . . . but may not condition its grant by the requirement that certain standards be maintained. . . ."

This point is argued so ably and at such length that it may result in forcing such an interpretation upon the majority opinion, regardless of what that opinion may have been intended to mean. Mr. Justice McLean did that very sort of thing in *Fox v. Ohio*²⁴⁹ thereby aiding in establishing a doctrine which he considered "a mockery of justice, and a reproach to civilization."²⁵⁰ The very vehemence of his dissent marked

249. 5 How. 410 (U. S. 1847).

250. Id. at 440. Consult: Grant, *The Lanza Rule of Successive Prosecutions* (1932) 32 COLUM. L. REV. 1309.

the case as authority on a question which the majority insisted was not even involved.

In the light of the innocuous nature of these contracts, it would seem that there is much to be said for this minority interpretation of the rule of the case. Had they been modeled upon the "license agreements" of the sugar bounty legislation of 1890²⁵¹ it would have been quite a different story. That act required the producer to post "a bond in a penalty, and with sureties to be approved by the Commissioner of Internal Revenue, conditioned that he will faithfully observe all rules and regulations that shall be prescribed for such manufacture and production of sugar." But the A. A. A. contracts were merely instrumentalities for the convenient administration of the act. There were no penalties attached to their breach, save the loss of benefits under them. The farmers were as free to violate their terms as if they had never signed them, and lost nothing by doing so that they would not have lost under a "conditional appropriation." If the mere repeal of the provisions for such contracts would save the law, Congress has gone to needless effort in dressing its new production control measure²⁵² as a "soil conservation and soil building" act and in seeking new sources of revenue²⁵³ to support it in order to retreat within the rule of *Frothingham v. Mellon*.²⁵⁴

Furthermore, if the majority did not mean that these contracts were merely an additional defect in the statutory set-up, its first two points, and certainly its second, are deprived of most of their practical significance. But if the second can stand alone, what is to become of the fourth point,²⁵⁵ to the effect that probably a "conditional appropriation

251. 26 STAT. 567, 583 (1890). See the discussion of this statute in (1936) 45 YALE L. J. 772.

252. P. L. No. 461, 74th Cong. (1936).

253. These are not included in the act, for obvious reasons. See (1936) 45 YALE L. J. 751. But their necessity is clear evidence of the superficiality of the rule that a taxpayer does not have a sufficient interest in the spending of money from the general fund to make him a "proper party" to contest its validity.

254. 262 U. S. 447 (1923).

255. One final matter must be mentioned in connection with these contracts. Counsel for the government apparently argued that the failure of the states to protest constituted constructive consent; "that, if any state objects, it may declare the contract void and thus prevent those under the state's jurisdiction from complying with its terms." The majority replied: "The argument is plainly fallacious. The United States can make the contract only if the federal power . . . to appropriate reaches the subject-matter of the contract. If this does reach the subject-matter, its exertion cannot be displaced by state action. To say otherwise is to deny the supremacy of the laws of the United States; to make them subordinate to those of a state. This would reverse the cardinal principle embodied in the Constitution and substitute one which declares that Congress may only effectively legislate as to matters within federal competence when the states do not dissent." This would seem to be a definite rejection of the theory that when spending for non-federal purposes the nation loses its status as a superior government; and as such it

of money" may be valid, even though the "conditions" are such that they could not be imposed as commands? "It is said that no one has doubted the power of Congress to stipulate the sort of education for which money shall be expended." Do not such stipulations "induce action in a field in which the United States has no power to intermeddle"? Are they not, "at best, . . . a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states?" By what stretch of the imagination, other than wishful thinking, could the United States Senate Committee on Agriculture and Forestry²⁵⁶ assert that under the new "soil conservation" substitute²⁵⁷ for the Agricultural Adjustment Act "The Secretary has no power . . . to enforce compliance by any farmer with any condition prescribed in or pursuant to" that act, if the mere subsidizing of approved actions constitutes regulation? In short, with all due respect to the learned justices who constituted the majority, they have woven a logical web which defies unweaving. They owe it to the profession and to the American people to make their meaning more explicit at the very first opportunity.

As a final cap to this sophistic phantasy, the opinion points out the type of "conditional appropriation which could not be sustained." Thus "an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad." Apparently Mr. Justice Roberts is acquainted with the philosophy of Mr. Justice Dunbar; for that learned judge used to remark²⁵⁸ that "the fallacy of a proposition can best be shown by distorting it." Are we to assume that the states have an exclusive monopoly over the teaching of doctrines "subversive of the constitution," and that Congress, by invading this field, would be violating the Tenth Amendment? The obvious answer, of course, is that such a statute would be unconstitutional regardless of which legislature passed it. The example has nothing to do with the division of powers between nation and states. It has no place in this opinion.

SUMMARY AND CONCLUSION

The spending power of Congress is broader than its legislative powers. But an appropriation is unconstitutional unless it is for a national public purpose. It is not for such a purpose unless it is for a "public" one which will advance the "general" welfare. The *A. A. A.*

would appear sound. Yet on the preceding page, in citing types of contracts which would be clearly unconstitutional, the opinion lists "contracts calling for violation of a state law." Let not your left hand know what your right hand doeth!

256. SEN. REP. No. 1481, 74th Cong. 2d Sess. (1936) 6.

257. P. L. No. 461, 74th Cong. (1936).

258. *Jones v. Reed*, 3 Wash. 57, 65 (1891).

opinion makes it clear that both tests are to be applied by the courts, neither being purely "political." The *T. V. A.* opinion has strengthened this conclusion, and apparently has added a third test when the government seeks to enter business: it must be one "consistent with the foundation principles of our dual system of government" and have some reasonable "relation to the purposes for which the Federal government was established." In strict logic this third test must be merely a re-statement of the other two; but from the connection in which it appears in the opinion, it seems to be a substitute method of attack wherein a negative answer would make it unnecessary to prove that a given undertaking is not for the "general welfare." Even so, catchy phrases have a knack of qualifying the meaning of the provisions from which they originally spring—witness "liberty of contract," "there is no commerce in manufacturing," "vested rights." If the *T. V. A.* phrases attach themselves to the spending power, they may prove of tremendous importance. Nor can we expect their use to be restricted to "government in business" cases. Hence we may well ask, is a national system of retirement pensions in keeping with "the principles of our dual system of government?" Does financial aid in establishing a system of unemployment insurance have a real relation to "the purposes for which the federal government was established?" Such a rephrasing of the issues²⁵⁹ would seem to enhance the probabilities of a judicial check upon the spending power, as one might honestly believe an act to be inconsistent with our constitutional system even though it would be beneficial to the nation.

Can the nation construct, operate, or administer *non-federal* undertakings, or can it only subsidize their conduct by others? What evidence we have would seem to dictate the former choice, but neither the *A. A. A.* nor *T. V. A.* opinion adds anything new. If it can carry on in its own name, does it retain full governmental powers, including its pre-eminent position under the doctrine of "national supremacy"? The *A. A. A.* opinion would seem to indicate that it does.

The important contribution of the *A. A. A.* opinion is the "motive" test: an appropriation may be unconstitutional because the real purpose is to purchase an acceptance of national regulation in *non-federal* fields. Possibly this only applies where a definite "contract" to abide by the regulations is required. Perhaps it only applies where private persons are seduced, having no application to grants-in-aid to the states. But it may be that it applies in any case where the effect is to "induce action in a field in which the United States has no power to inter-

259. In essence this new test is essentially identical to the "spirit of the Constitution" yardstick applied in the ill-fated greenback case of *Hepburn v. Griswold*, 8 Wall. 603 (U. S. 1870). For a vigorous attack upon it as "too abstract and intangible for application to courts of justice" see the dissenting opinion in that case, *id.* at 638.

meddle." To attempt a more definite statement of this new rule would be only a false show of erudition and an effort to find certainty where only uncertainty, as yet, exists.

The dissenting judges have insisted that such a test, whichever form it may take, coupled with an acceptance of the rule that the spending power of Congress reaches objects not within the scope of its normal legislative powers, is so indefinite and self-contradictory as to be "incapable of practical application." The point would seem to be well taken. As they have stated,

"It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure."

When a single fact—in this instance, a "condition"—can be used to justify or condemn, according to one's fancy, the acme of discretion has been reached, exceeding even the alternative techniques of the tax cases. But is this an argument against the test? Possibly it is one in its favor. "A good judge extends his jurisdiction." Perhaps this ancient maxim has given way to a new and more significant one: it is the function of the Court to expand the area of its discretion.

Certainly the history of judicial review substantiates such a conclusion. "Natural justice" gave way to "the spirit of the constitution" and then to "due process of law" because each in turn proved as flexible as its predecessor, yet permitted of projection into more and more fields of legislative endeavor.²⁶⁰ The rigid contract clause of Marshall gave way to the more flexible one of Taney, and later judges have still further subdued its ancient intractability. The taxing power was brought under control, but not without preserving a technique to sustain whatever abuses of it are not thought to trespass upon rights meriting judicial protection. Often this process results in further curtailment of the powers of our legislatures, but it may also, as in the case of the contract clause, expand them. The essential common element is that the discretionary power of the Court is enhanced. Judicial review is now at its highest point in history. Even the "almost forgotten" privileges and immunities clause of the Fourteenth Amendment has been found to contain untapped sources of power.²⁶¹ Certainly an effort to subdue the spending power is in keeping with the modern tendency of the Court.

It is likewise fitting that this effort should be first undertaken in a production case, thus paralleling developments in the field of taxation.

260. Concerning the drawbacks of "natural justice" as a basis of judicial review, see Grant, *The Natural Law Background of Due Process* (1931) 31 COLUM. L. REV. 56.

261. *Colgate v. Harvey*, 56 Sup. Ct. 252 (1935), noted in (1936) 45 YALE L. J. 926; but cf. (1936) 45 YALE L. J. 751.

But in neither instance was the opinion explained in terms of production, but rather of "the rights of the states." The new taxation rule was immediately extended to other phases of commerce, and has finally reached freedom of speech and of the press. Should not similar developments be looked for relative to spending? The new railroad pension plan would seem to offer itself for the obvious first step, since it is a clear attempt to regulate the employer-employee relationship. And then there is the Social Security Act, with its federally administered pensions and federally aided unemployment insurance systems, both of which could be attacked on similar grounds.²⁶²

Perhaps the greatest stumbling block in the way of this forward movement is James M. Beck's outstanding success: *Frothingham v. Mellon*. Is that decision doomed? If it stands, the decision in the *A. A. A.* case may result in nothing more than a shift in the tax burden to support doubtful *non-federal* appropriations, from earmarked systems to the general fund. Injustice, rather than social advantage, may well follow. Surely the new "soil conservation" measure²⁶³ is a thinly disguised effort to continue the old *A. A. A.* program on an enlarged and semi-permanent scale. If it is the regulation of production, rather than merely the placing of such a large portion of the burden upon the processor, that is to be forbidden, the *Frothingham* rule must go.

That case should be a comparatively easy one to overrule, for it is at complete variance with the decided weight of authority and the modern trend as to state as well as municipal expenditures. And of course it can always be distinguished. The appropriation²⁶⁴ in question in the *Frothingham* case involved less than a million and a quarter dollars per year. The new "soil conservation" act involves a half a billion, yet it is exceeded by W. P. A. Although the interest of the taxpayer, if degree of interest is to be the test, may have been "remote, fluctuating, and uncertain" in that case, can the same be said as to his interest in the present acts?

But is there not danger in such a reversal, or even qualification, of that rule? If we followed the Austrian system of judicial review, under which the constitutionality of a statute can only be questioned in the court of last resort, it would be another matter. However, we have no special procedure for passing upon constitutional issues. Indeed, our philosophy of judicial review does not even permit of it, since constitu-

262. Of course statutes contemplating state cooperation may also be nullified by successful attacks upon the validity of the state laws. As this is written the New York Court of Appeals is being asked to hold that the state unemployment insurance act violates "due process." *Chamberlin v. Andrews*, and *Associated Industries of New York v. Department of Labor of the State of New York*, both of which were argued on March 19.

263. P. L. No. 461, 74th Cong. (1936).

264. 42 STAT. 224 (1921).

tional issues cannot be raised except as incidental to some other question of law. The Court may find this fact embarrassing. In short, it is entirely probable that in undertaking to bring the spending power of Congress under effective control it has undertaken a bigger task than it can handle.